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Voluntary Peer Review of Competition Law and Policy:

Philippines

Overview

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Note

Voluntary peer reviews of competition law and policy carried out by UNCTAD fall within the framework of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the General Assembly in 1980. The Set seeks, among other things, to assist developing countries in adopting and enforcing effective competition law and policy suited to their development needs and economic situation.

This Voluntary Peer Review of Competition Law and Policy has been prepared in response to the request of the Intergovernmental Group of Experts as stated in the Report of the Intergovernmental Group of Experts on Competition Law and Policy on its thirteenth session (TD/B/C.I/CLP/25). The opinions expressed in this Voluntary Peer Review are those of the peer reviewers and do not necessarily reflect the views of the United Nations Secretariat.

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Acknowledgement

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This report was prepared for UNCTAD by Deunden Nikomborirak and Bob Weymouth. The substantive backstopping and review of the report was the responsibility of Hassan Qaqaya and Dongryeul Shin. UNCTAD would like to acknowledge valuable assistance provided by Geronimo L. Sy, Assistant Secretary of the Department of Justice of the Philippines (Office for Competition (OFC)). UNCTAD would also like to acknowledge the staff of the OFC who contributed during the preparation of this report.

Introduction

1. This report has been developed based on material current at March 2014, several months after the fact finding mission to the Philippines. Legislative updates after the time of visit have been taken up in the report.

I. Foundations and history of competition policy

2. The Philippines is a sovereign State in South-East Asia in the Western Pacific Ocean. It is an archipelago comprising 7,107 islands, with a population of more than 103 million people. The country is classified as a lower-middle income country by the World Bank with a gross domestic product (GDP) per capita of $2,701 in 2012 (current price). Currently, the country is enjoying an unusual period of political stability that helps boost economic growth. In 2012, the country's GDP grew at the rate of 6.8 per cent – well above the Association of Southeast Asian Nations (ASEAN) region's 5.3 per cent – despite the economic difficulties in the United States of America and the European Union.

3. However, the country's income inequality is among the highest in Asia as wealth is concentrated in the hands of a few families. The current Government is implementing large-scale projects, such as the distribution of cash transfers, to alleviate the problem. Yet, a major restructuring of the economy will be required to ensure that the prospective economic growth and prosperity will trickle down to the poor rather than concentrated among the few rich.

4. The Philippines adopts relatively liberal trade and investment policies. Import duties on most goods have been reduced to zero under the ASEAN Free Trade Agreement, and the Foreign Investment Act (RA 7042, 1991, amended by RA 8179, 1996) liberalized the entry of foreign investment into the Philippines. Under the Act, 100 per cent foreign equity may be allowed in all areas of investment except those reserved for Filipinos by mandate of the Philippine Constitution[1] and existing laws.

5. While trade liberalization may help promote competition from imported products, for certain goods, high logistic costs can hinder import penetration. Although high prices (from alleged collusion) may be attractive to importers, dominant local manufacturers can easily cut prices to fend off competition from imported products because of clear cost advantage.

6. As an island State, moving products or services from one island to another is likely to be costly, rendering the domestic market highly fragmented, and hence particularly vulnerable to capture by regional monopolies.

7. Moreover, foreign investment restriction in public utility services mandated by the Constitution also contributes to market concentration in key service sectors such as telecommunications, energy and transport. While anti-trust law has long been a part of the Philippines legal system, starting with the old penal code administered by the Spanish

[1] Article XII National Economy and Patrimony, section 11: No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty per centum of whose capital is owned by such citizens.

regime in the early 1900s, there is no doubt that the country is in need of a comprehensive competition law and policy.

8. Despite the fact that the 1987 and still current Philippine Constitution prohibits monopolies,[2] the country still does not have a comprehensive competition law. Various competition-related clauses can be found in the penal code, the civil code, the price control law and several sector-specific laws. The substantive provisions found in these laws are by no means comprehensive. For example, there are no provisions governing the abuse of dominance, although the word "monopolization" appears in various provisions under several laws. There is also no merger regulation for anti-trust purposes.

9. The recognition of a need for a comprehensive competition law is long standing.

10. The time for the promulgation of a competition law may be ripe for several reasons. First, there is clear political commitment at the highest level: the President of the Philippines called for an anti-trust law to fulfil the constitutional guarantee of fair competition in his first state of the nation address in July 2010. The creation of the country's first Competition Authority, the Office for Competition, under the Department of Justice (DOJ) under executive order No. 45 issued in the following year is a clear testimony of the commitment. Second, the competition bill has gained wide support from the business and academic community as well as key members of the legislature.

II. The legal framework

Introduction

11. The Philippines has a history of laws dealing with competition issues going back to the Spanish legal regime. Current laws dealing with monopolies go back to 1925 and restraint of trade provisions date back to 1932 in the Revised Penal Code. The current constitution with reference to control of monopolies was established in 1987 although the same provisions are similarly found in the previous constitutions.

A. Current laws

12. The main legislation dealing with competition issues has been summarized as:

> "The 1987 Constitution, Article X11, Sections 1,6,11,19 and 22;
>
> The Revised Penal Code (Act No. 3815), Article 186 (further amended by Republic Act (R.A.) No 1956), further integrated by Section 1, Paragraph d (5) of the Republic Act No. 7080, which defines and penalizes the crime of plunder; and
>
> The New Civil Code (R.A. No. 386), Article 28 and Act No. 3247 ("The Act to Prohibit Monopolies and Combinations in Restraint of Trade"), Section 6, on the recovery of damages.
>
> In addition, special laws and statutes address competition related practices in specific sectors, such as the Price Act (R.A. No. 7581), Section 5; the Cooperative Code (R.A. No. 6938), Article 8; and the Downstream Oil Industry Deregulation Act of 1998

[2] Article XII, sections 13 and 19: "The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity and shall regulate or prohibit monopolies when the public interest so requires".

(R.A. No. 8479), Rule III, Section 9 and Rule IV, Section 15. The Corporation Code (Act No. 68) provides for merger control."

13. While this description may be accurate and comprehensive, it does nothing to explain the nature and coverage of the competition laws in the Philippines. There is no unified law or enforcement regime that deals with all of the anticompetitive behaviours that may impact on consumers.

14. At the heart of the competition regime is the article 186. It is a provision that provides for criminal penalty at the lower end of the scale (ranging from 6 months and 1 day to 2 years and 4 months imprisonment) and a fine that can only be described as ineffective. The penalty range of 200 to 6,000 pesos was set in 1932 and has never been upgraded. The penalty is not a likely deterrent (the range expressed in United States dollars is approximately $15 to $150).

15. Unlike some of the other provisions addressed in this paper, there is no administrative penalty regime contained within article 186.

Act to Prohibit Monopolies and Combinations in Restraint of Trade (Act No. 3247) of 1 December 1925

16. Act No. 3247 is the oldest competition law that penalizes monopolies and combinations in restraint of trade and provides for treble damages in civil actions:

> "Section 6. Any person who shall be injured in his business or property by any other person by reason of anything forbidden or declared to be unlawful by this Act, shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

Amending the Law Prescribing the Duties and Qualifications of Legal Staff in the Office of the Secretary of Justice (RA No. 4152) of 20 June 1964

17. This is a law that vests the Secretary of Justice with legal and enforcement duties in competition. Section 2: The Secretary of Justice shall:

> "study all laws relating to trusts, monopolies and combinations; to draft such legislation as may be necessary to up-date of revise existing laws to enable the Government to deal more effectively with monopolistic practices and all forms of trusts and combination in restraint of trade or free competition and/or tending to bring about non-competitive prices of articles of prime necessity; to investigate all cases involving violations of such laws; and to initiate and take such preventive or remedial measures, including appropriate judicial proceedings, to prevent or restrain monopolization and allied practices or activities of trusts, monopolies and combinations."

The Price Act (RA No. 7581) of 27 May 1992

18. This is arguably the next most powerful statute in relation to anticompetitive conduct.

19. In considering the provisions within the Price Act it is vital to remember the purpose of this law – "An act providing protection to consumers by stabilizing the prices of basic necessities and Prime commodities and by prescribing measures against undue price increases during emergency situations and like occasions." So while some provisions have a wider application, the agency tasked with administration of the law is an agency with a major objective to deal with prices during emergency situations and focused on basic necessities and prime commodities as defined in the Act.

20. The Price Act includes the following key sections:

Section 5: Illegal acts of price manipulation

Section 15: Penalty for acts of illegal price manipulation

Section 17: Violation by juridical persons

Section 20: Criminal penalties without prejudice to administrative sanctions.

Section 3: Definition of terms – for the purposes of this Act, the terms:

> "(1) 'Basic necessities' includes: rice; corn; bread; fresh, dried and canned fish and other marine products, fresh pork, beef and poultry meal; fresh eggs; fresh and processed milk; fresh vegetables; root crops; coffee; sugar; cooking oil; salt; laundry soap; detergents; firewood; charcoal; candles; and drugs classified as essential by the Department of Health;"

and at subsection (8):

> "'Prime commodities' include fresh fruits; flour; dried processed and canned pork; beef and poultry meat; dairy products not falling under basic necessities; noodles; onions; garlic; vinegar; patis; soy sauce; toilet soap; fertilizer; pesticides; herbicides; poultry; swine and cattle feeds; veterinary products for poultry, swine and cattle; paper. School supplies; nipa shingles; sawali; cement; clinker; GI sheets; hollow blocks; plywood; plyboard; construction nails; batteries; electrical supplies; light bulbs; steel wire; and all drugs not classified as essential drugs by the Department of Health."

Section 10: Powers and responsibilities of implementing agencies, subparagraph (9): Investigations may be conducted of any violation of this Act and, after due notice and hearing, administrative fines may be imposed in such amount as may be deemed reasonable and which shall in no case be less than 1,000 pesos nor more than 1 million pesos.

21. The Price Act offers a realistic option to address anticompetitive price collusion across a broad range of commodities. It is a long way from dealing with the total economy and does not address the provision of services.

22. The Price Act does not directly address the conduct of corporations; however, section 17 clearly establishes that liability will be with the responsible officials and employees.

The Downstream Oil Industry Deregulation Act (RA No. 8479) 1988

23. The two most relevant sections within this law relate to cartelization and predatory pricing in sections 11 (a) and (b).

24. Penalties for violation of section 11 include from three to seven years imprisonment, and fines ranging from 1 million pesos to 2 million pesos. As with other criminal sanctions, sanctions apply to natural persons.

The Revised Penal Code (RA 3185), article 185

"Machinations in public auctions."

25. It is noteworthy that this is the first reference to an "attempt" at anticompetitive conduct being treated in the same way as actual conduct.

Philippines Corporation Code, Act No. 68. (1982)

26. Mergers and acquisitions are covered by sections 76 to 80 of the Corporation Code. Parties are required to file articles of the merger or consolidation with the Securities and

Exchange Commission. Approval by the Commission is required prior to issuing a certificate of merger or consolidation.

27. There is no competition assessment or competition law-based guidelines that would be used by the Securities and Exchange Commission when considering a merger prior to approval.

Summary of the current laws

28. The most comprehensive law dealing with anticompetitive conduct is within the Revised Penal Code – the statute provides no administrative penalty options and does not penalize corporations other than via the employees and officials of those companies (in the existing regime in the Philippines, criminal liability can only be found against individuals and not legal entities). The provision does offer a custodial penalty and a paltry fiscal penalty of 6,000 pesos. The conduct most easily recognized that can be dealt with in this statute is a combination in restraint of trade, which would include a cartel by the normal definition of the term.

29. The Price Act offers regulators an alternative to criminal sanctions when pursuing cartel conduct. Administrative penalties are available and may be levied without impact on the scope for pursuit of criminal sanctions. The reach of the Price Act is limited, however – only conduct concerning goods defined in section 3 as "basic essentials" or "prime commodities" is captured.

30. Merger control does not allow the prohibition of a merger on the basis of competition analysis.

31. There exists, therefore, what appears to be a robust law dealing with attempts to manipulate public auctions and also with attempts to manipulate price/participation.

32. With the exception of the Price Act, and in addition to treble damages under civil penalties, the laws are of a criminal nature, requiring proceedings to be launched and dealt with in compliance with Supreme Court rules. Offences need to be proven to a criminal standard, beyond doubt, before the prosecutor can succeed.

B. Association of Southeast Asian Nations guidelines

33. The Philippines, as a member State of the ASEAN Economic Community, has adopted a goal of introduction of nation-wide competition policy and law by 2015.

34. In summary form, the current laws of the Philippines, when assessed against the framework suggested by the ASEAN guidelines, are as follows:

ASEAN regional guidelines	*Philippines competition law*
Prohibition against anticompetitive mergers	No
Merger regime – with power to suspend	No
Prohibition against collusive agreements	Yes
Leniency policy	No
Prohibition applying to vertical conduct	No
Prohibition against unilateral conduct	No
Criminal sanctions	Yes for individuals, no for corporations
Private rights	Yes

C. Potential for new competition laws

35. Proposals for the enactment of a unified competition law started in the 1990s, but it was only during the fourteenth Congress[3] that legislative efforts picked up, resulting in the drafting of the first consolidated bill.[4] During the fifteenth Congress, consolidated bills in substitution of a number of existing bills have reached the third reading in the Senate and the House of Representatives. The Senate passed committee report No. 97 (annex A) recommending approval of the consolidated bill.

36. Similar bills, as well as new versions, were filed in the sixteenth (current) Congress. Committee hearings in both chambers are underway and, for its part, the OFC has submitted an updated version of the consolidated bill (annex B) after a series of consultations with private and government entities.

37. While it may be too early to predict, a consolidated version of these earlier bills will, optimistically, be filed and will progress into law during the life of the sixteenth Congress. A factor in this optimism is the ASEAN goal of a nationwide competition law and policy by 2015.

III. Institutional framework

38. The institutional framework within the Philippines changed dramatically on 9 June 2011 when the President issued executive order No. 45. Significantly, this order designated the DOJ as the Competition Authority, while at the same time creating the OFC under the Office of the Secretary of Justice to perform the following duties and responsibilities:

> "a. Investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade;

[3] The Congress of the Philippines is the national legislature of the country consisting of two chambers – the Senate and the House of Representatives. The Senate members (known as senators) are elected for six-year terms on a nationwide voting system. As a result of this system, 12 of the elected Senators fall due for replacement at each three-year election. Members of the House of Representatives (known as congressmen/congresswomen) are elected for three-year terms.

[4] The OFC shepherded the preparation of the first consolidated bill when the DOJ Assistant Secretary was elected chair of the Senate Subcommittee on Antitrust during the fourteenth Congress.

b. Enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices;

c. Supervise competition in markets by ensuring that prohibitions and requirement of competition laws are adhered to, and to this end, call on other government agencies and/or entities for submission of reports and provision for assistance;

d. Monitor, implement measures to promote transparency and accountability in markets;

e. Prepare, publish and disseminate studies and reports on competition to inform and guide industry and consumers; and

f. Promote international cooperation and strengthen Philippine trade relations with other countries, economies, and institutions in trade agreements."

39. The practical result of the executive order is that the Philippines now has an overarching government body established with the purpose of investigating and enforcing existing competition laws, monitoring and supervising markets to improve accountability and transparency and in general terms promoting information to enhance competition and protect consumers.

40. The creation of the OFC does not limit the role of the 63 sectoral regulators but does introduce expectation of a collegiate or concurrent approach.

A. The sector regulators

41. The Philippines has many sector regulatory bodies established by sector-specific laws. The most prominent include the Energy Regulatory Commission (ERC), the Department of Energy, the National Telecommunications Commission, the Philippines Port Authority and the Department of Trade and Industry. Each of these regulatory agencies is of unique institutional design, but none is truly independent of the executive power.

42. It should be noted that in the Philippines, many regulatory functions are under the purview of the executive or legislative power. For example, the National Telecommunications Commission and the ERC do not have the authority to issue "licences" as is the case in most countries. The operation of telecommunication services and electricity distribution requires a "national franchise" granted by the Congress. Port charges – such as wharfage and wet charges – that are of national application require approval from the Office of the President.[5] When it comes to competition regulation, however, these authorities are given broad residual power.

43. In effect, the enforcement of competition rules in regulated sectors until today is very limited. No competition cases have yet been brought to court by any of these bodies despite the fact that a number of these regulated markets appear to be highly concentrated and hence susceptible to restrictive practices.

B. Relationship between the Office for Competition and sector regulators

44. The executive order 45 which created the OFC did not diminish the legal authority of the sector regulators.

[5] PDP Australia Pty Ltd and Meyrick and Associates, 2005, Promoting effective and competitive intra-ASEAN shipping services: The Philippines country report. Available at http://www.asean.org/archive/AADCP-REPSF-Project/Philippines.pdf (accessed 28 April 2014).

45. It should be noted also that neither of the competition bills currently proposed by the Senate and the House of Representatives envisions the centralization of the Competition Authority. Pending bills stipulate that the power of the future Competition Authority shall be "cumulative" to that of the different government agencies over an industry or sector of an industry and shall not in any way derogate the power and authority of these agencies. At the same time, these bills do not exempt regulated sectors with their own regulatory body from the competition law. They prescribe that "all government agencies shall cooperate and coordinate with one another in the exercise of their powers and duties to prevent overlap, share information, or such other effective measures".

46. Although the pending bills advocate concurrent regulation, concrete details about the scope and method of cooperation and coordination are not prescribed. One House of Representatives bill, for instance, touches upon the specific issue. It stipulates that the competition regulatory body shall consult with the sectoral regulatory body when issuing guidelines of rules and regulations that are applicable to regulated industries.

47. However, the OFC version submitted to the sixteenth Congress proposes that jurisdiction in the enforcement and regulation of all competition-related issues should be vested in the Competition Authority.

C. Institutional aspects of the proposals in the House of Representatives and Senate Competition Bills

48. The consolidated Senate version in the fifteenth Congress proposes an office for competition in the DOJ, much like the current institutional structure of the OFC, but with legal power. The office would report to the congressional oversight on competition, to be composed of chairpersons of designated Senate and House of Representatives committees, two senators and two representatives nominated by the Senate President and the Speaker of the House Representatives. The office would be funded through an annual general appropriations act with 10 million pesos for the initial budget requirement.

49. The consolidated House of Representatives version, also of the fifteenth Congress, proposes an independent Competition Authority, the Philippines Fair Competition Commission. The Commission would be composed of a chairperson and four associate commissioners. The chairperson and two associate members would be members of the Philippines Bar, while the other two members would be of recognized competence in the field of economics, commerce, accounting or financial management. All members would be appointed by the President.

50. It is noteworthy that the OFC has taken the initiative to prepare the consolidated Senate version for the current Congress.

51. Section 4.3 of the ASEAN *Guidelines on Regional Competition Policy* entitled "Institutional structure of the Competition Regulatory Body" provides that:

> "(1) Member countries may choose the appropriate institutional design of their respective competition authority, be it a single independent authority, multiple sectoral authorities or a body within the government department or ministry;
>
> (2) Member countries may grant a competition regulatory body as much administrative independence as necessary and as possible, to avoid political influence;
>
> (3) Member countries may determine that the Competition Authority's budget should be free from political considerations – that is, that they separate the authority's budget from that of other governmental functions or make part of the budget dependent on income generated by the competition regulatory body;

(4) Member countries should also determine whether they would establish an administrative appeal body which is independent of the competition regulatory body and executive Government or leave appeals to the judicial authority."

52. The institutional design of the Competition Authority proposed by both Senate and House of Representatives competition bills is that of an agency under a government organization, namely, the DOJ in the case of the Senate's version and the Office of the President in case of the House of Representative's version. Hence, the administrative and financial independence of the proposed competition agencies are potentially limited. However, the House's version does allow the Competition Authority to keep all income generated from performing its duties, except financial penalties. Both versions provide for an appeal to the judicial authority.

53. The UNCTAD Model Law on Competition[6] commentary makes it clear that it is not possible to lay down how the authority should be integrated into the administrative or judicial machinery of the given country. "The present Model Law has been formulated on the assumption that probably the most efficient type of administrative authority is one which is a quasi autonomous or independent body of the Government, with strong judicial and administrative powers for conducting investigations, applying sanctions, etc., while at the same time providing for the possibility of recourse to a higher judicial body."

54. Of the two models proposed in the fifteenth Congress, the House of Representatives version is the "most independent" structurally, and arguably less prone to political interference. In practice however, the DOJ currently has key criminal investigation and prosecution teams within it (the National Bureau of Investigation (NBI) and the National Prosecution Service (NPS)) which appear to be respected as professional enforcement/prosecution agencies.

55. Ultimately, the decision on agency design is best left to the Philippines – the balance of costs, efficiency, effectiveness and speed of implementation all need to be part of the decision while respecting the ultimate effectiveness of a Competition Authority is heavily reliant on the perception of independence from political interference.

IV. The Office for Competition – key initiatives for the first 33 months

56. As previously reported, the establishment of the OFC by executive order 45 was a significant step toward the development of an economy-wide competition regime. Notwithstanding that the OFC was established by executive order in June 2011 without any new legislative tools, the significance of this Competition Authority cannot be ignored. For this reason it is useful to document the major activities and achievements of this relatively new organization.

57. A considerable effort was required to deliver an organization in a manner consistent with the executive order. By October 2011, the Secretary of the DOJ issued department order No. 844, formally organizing the OFC and designating an Assistant Secretary in charge. Thus, the first Competition Authority of the Philippines was created.

[6] Paragraph 160, chapter IX, of the 2010 Model Law on Competition, published at the direction of the Intergovernmental Group of Experts on Competition Law and Policy, tenth session, 7–9 July 2009.

58. By January 2012, the OFC had adopted a dictum, vision, mission and set of principles or values.[7]

59. The immediate focus of the new Competition Authority on enunciating clear fundamental values is important. In the Philippines, given the levels of perceived corruption and inequalities, the OFC is to be commended for being very open and transparent about certain core values – concepts such as transparency, accountability, fairness and truth.

60. The OFC has been granted annual budgets as a separate regular item in the General Appropriations Act. From only two full-time staff in 2012, the OFC now has 15 full-time lawyers and economists complemented by a composite team of 20 lawyers from agencies attached to the DOJ. The creation of additional legal and economics divisions is expected within the year.

61. The OFC has recognized the need to work in a manner that is both complementary and cooperative with sector regulators. To respond to the functions defined in executive order 45, working groups have been established, each being co-chaired by a representative of the sector regulators.

62. In this initial phase of establishing a workable Competition Authority, this working party approach with high-level engagement by other key regulators is sensible and likely to assist the overall ideal of cross-sector cooperation.

63. The Secretary of the DOJ has issued draft guidelines designed to better explain how the OFC and sector regulators would work together as required to comply with executive order 45. The objective of the guidelines is to add helpful explanations concerning referral processes, complaint handling, and to clarify the relationship between technical regulation, economic regulation and competition enforcement. The scope of this challenge is highlighted by the number of regulators listed in the guidelines: a total of 63 sectoral agencies have been identified.

64. The OFC likewise issued its first policy paper, entitled "Cooperation for competition: The role and functions of a Competition Authority and sector regulatory agencies", designed to develop a framework for the interface between the OFC and sector regulators.

V. Enforcement action

65. The OFC has issued enforcement guidelines, such as the executive order 45 implementing rules, legal representation guidelines, advisory opinions on legal and consumer protection matters, and updated complaint-handling procedures. Policy papers and case studies on competition issues were developed and sector studies in telecommunications, energy and transport are in preparation. The OFC has also established the Sector Regulators Council for the clustering of sectors and case investigation.

66. The first cartel case involving liquefied petroleum gas dealers was filed in 2012. The case is now under a motion for reconsideration.

67. The OFC has 21 cases in its files, seven of which have been resolved while the remaining 14 are in the process of assessment.

[7] OFC, 2012, "Year 1 report and Strategic Plan of Action", available at http://www.aseancompetition.org/resources/articles_publications/2012-07/ofc-year-1-report-and-strategic-plan-action (accessed 1 May 2014).

VI. Competition advocacy

68. Competition advocacy can be an extremely important function for a Competition Authority in developing economies where the promulgation of laws and regulations are not yet properly assessed for their impact on market competition. Many monopolies or oligopolies can be traced back to State policies or regulations that serve to restrict market entry or favour a dominant incumbent over smaller competitors or potential new entrants.

69. Executive order No. 45 does not spell out the OFC's advocacy role. It appears to focus on its adjudicative responsibilities of enforcing fragmented competition provisions under different laws and the monitoring of trade practices in the market. The competition bills of both the Senate and the House of Representatives put similar emphasis on adjudication although both prescribe that the Competition Authority "proposes legislation for the regulation of commerce, trade or industry".

70. The OFC and the Tariff Commission that acted as the focal office for previous competition work have done much advocacy work with the private sector. As an office under the DOJ, the OFC also has naturally strong ties with judges, public prosecutors and investigators.

71. The OFC prepared an advocacy plan which led to the issuance of presidential proclamation No. 384 declaring 5 December of every year as National Competition Day.

72. Moreover, as the key indicator of its work, the OFC published its Year 1 and Year 2 Annual Reports. It also launched the first ever introductory course on competition law and policy for law and business degree students at a premier university in the country.

73. Regular consultations with business organizations and industry associations were undertaken to promote voluntary compliance to competition laws.

74. However, consumers and civil society, the other major key stakeholders, are not yet fully aware of issues relating to competition law and policy. The OFC, as well as the regulatory authorities proposed in both the Senate and the House of Representatives bills, are also not mandated to advise the government on competition matters.

75. While the absence of a workable competition law may limit the capacity of the OFC to engage in meaningful advocacy and outreach, the OFC has identified an ongoing commitment to advocacy as a key priority within the current Strategic Plan of Action as follows: "Preparation of long-term advocacy plan including regular updating of OFC website, publication of IEC [information, education and communication] materials, and advocacy programmes for business (with a focus on SMEs [small and medium-sized enterprises]), consumer, media, academic and related groups/sectors".

VII. International cooperation and technical assistance

76. The OFC Year 1 Report states:

> "Members of OFC have been to workshops and seminars in Japan, Viet Nam, Singapore, Korea [the Republic of Korea], Thailand, Laos [the Lao People's Democratic Republic], Indonesia, Brunei and Australia. OFC has established relationships with organizations including Japan International Cooperation Agency (JICA), European Union (EU), German Cooperation Agency (GIZ), American Bar Association – Rule of Law Initiative (ABA-ROLI), United States Agency for International Development (USAID) and World Bank–International Finance Corporation (WB–IFC)."

77. In addition to participation in the events mentioned, OFC has taken an active role in the ASEAN Experts Group on Competition and has been elected as chair for the period 2013–2014. Its key initiatives include the development of:

(a) A memorandum of understanding on regional cooperation;

(b) Sector studies at the regional and/or national levels;

(c) A mechanism for categorizing ASEAN Experts Group on Competition documents;

(d) A system for measuring the effectiveness of ASEAN member States individually and collectively as part of ASEAN through major indicators.

78. The OFC is now recognized within ASEAN and across the international community as the central agency implementing competition law and policy within the Philippines. It became a member of the International Competition Network in 2012.

79. The OFC entered into a memorandum of understanding with the Japan Fair Trade Commission for cooperation in enforcement and technical assistance. It hosted the 2013 ninth East Asia Top Level Officials' Meeting on Competition Policy and the eighth East Asia Conference on Competition Law and Policy, and will be this year's host of the fourth ASEAN Competition Conference.

80. Perhaps the greatest challenge facing the OFC is to devise methodologies to ensure learnings from international visitation and/or training workshops are institutionalized. In the early days of any organization there is a real risk that internal systems are not mature enough to adequately capture the arrival of new information and translate it into systems and procedures for the benefit of the organization. Thus, the OFC focus has been to develop a basic system that ensures that all national and international events attended and/or organized are properly documented and disseminated.

81. Overall, it can be said that the country has made meaningful strides in the implementation of competition law and policy through the OFC. These gains have translated into an improving performance in global rankings for the Corruptions Perception Index (from 129th in 2011 to 94th in 2013) and the Global Competitiveness Index (from 75th in 2011–2012 to 59th in 2013–2014).

VIII. Recommendations

82. It is impossible to progress to detailed observations about competition law without firstly acknowledging the ongoing challenge of removing corruption and perceptions of inequality from the community. Slogans such as "No corruption, no poverty" and "Corruption steals from the poor" appear as part of the push to crack down on corruption. The extent to which corruption impacts on the consideration of laws cannot be underestimated. All laws need to be administered in a manner that is understood by the wider community to be transparent and just. While this may not be easy to deliver, it is clear the OFC has started life with this in mind. In fact, the OFC has prepared a second policy paper entitled "Governance in the enforcement of competition policy and law" that discusses the best mechanism for effective enforcement of competition law and policy.

83. It is reported that the President of the Philippines has used his power of veto on as many as 200 laws during the fifteenth Congress – many of these being local laws. Discussion on this previously very rarely used authority suggests that the veto has been applied where the President sees practical challenges in applying the law as framed, and the potential for unintended consequences. While the legislative process provides for the houses to jointly deal with such situations there is no record that any bill vetoed by the

President has subsequently been enacted by vote of the two houses. This trend would suggest the President is using his power to significantly contribute to the reform process to ensure that new laws do not bring any further inequalities/unfairness to the community even where it is unintended.

The law – current and potential new laws

84. The existing laws in the Philippines do not deliver a comprehensive competition framework. The need for a new set of laws is well documented with the recent bills before the fifteenth Congress being a practical demonstration that a comprehensive competition law is close. Exactly how close is impossible to measure.

Recommendation: A comprehensive competition law applying to all parts of the economy should be drafted and passed into law through the parliamentary process at the earliest opportunity.

85. Two issues that are worthy of mention as a new law is being contemplated is the question of exemptions, and the level of independence of the regulator.

Recommendation: Any new law should be designed as an "economy wide" law with very limited scope for exemptions unless a public benefit test is written into the law.

86. The discussion of competition bills before the fifteenth Congress has in part been side tracked to a discussion about the merits of an independent regulator versus an "in-house" regulator.

87. Far more important than the question of so-called independence is the question of adequate and ongoing funding.

Recommendation: Any new regulatory model should be adequately funded to deliver traditional enforcement together with education, advocacy and business support. The concept of the agency being self-funded by retaining monies levied as penalties or fines should be avoided due to the perverse incentives it creates.

Recommendation: Any new regulatory model should be established in a manner that has considered the call for independence from political interference within the UNCTAD Model Law on Competition, and is likely to be perceived by the wider community as effectively independent of the political system.

The criminal standard of proof

88. The existing laws in the Philippines offer criminal penalties when an offence can be proven before the court. As with all criminal offences in the Philippines, the burden of proof for such offences is the very high criminal burden – beyond reasonable doubt.

89. The proposals for new laws before the fifteenth Congress also include criminal offences.

90. Is it realistic to frame competition law in this criminal environment?

91. The pursuit of competition law offenders as criminals is not unique to the Philippines. The real issue is the extent to which a lesser offence with a lesser burden of proof may be desirable.

92. The competition regulator, whether "independent" or "internal", armed with a comprehensive new law that meets all of the criteria recommended by ASEAN guidelines will still face the major challenge of how to implement the law in a manner that encourages the commercial sector to quickly become compliant. Perhaps not surprisingly, the toolbox

of the regulator will need to include criminal, civil and administrative sanctions along with educational/advocacy efforts.

Recommendation: The effective use of the full range of enforcement options must be recognized by both the legislature and the officials of any future competition regime. The challenge of the criminal burden of proof for cases involving anticompetitive agreements and the lengthy time frame for such cases to progress drive a need to consider all options to quickly drive compliance.

Administrative penalties

93. The bills before the fifteenth Congress provide for administrative penalties within the range 10 million pesos to 50 million pesos for a natural person. Penalties for a firm range from 250 million pesos to 750 million pesos. These are very significant penalties and will need to be administered in a manner that is consistent and transparent. While there is no competition law, it is not possible to test the administration of penalties under that law, but it is possible to review the processes used in the Department of Trade and Industry to get a feel for the likely process.

94. The administrative penalty as provided for in the Price Act and the proposed competition laws is a penalty without reference to an independent judicial body. It is understandable that some parties may argue that the Competition regulator must be independent if it has the power to impose penalties of up to 750 million pesos. In a community where there is a long standing suspicion about the fairness and equity of some government agency decisions, it seems inevitable there will be suspicion surrounding decisions to impose or not to impose penalties and the size of those penalties.

Recommendation: Clear guidelines should be produced explaining decision-making, evidence-taking, hearings and appeal rights for the administration of any penalty regime included in any new competition laws.

Concept of joint and several liability

95. A feature of both bills before the fifteenth Congress is a provision dealing with the joint and several liability of company officers.

96. This is an extremely important feature of a competition enforcement regime – the capacity to hold a number of natural persons liable and prevent the corporate shield from removing any incentive to comply is vital.

Recommendation: Any competition law should contain a provision to ensure, where the offender is a corporation, partnership, association, firm or other entity, that the financial liabilities are joint and several directed against directors, executive officers, general partners, and the like.

Dealing with leniency policy, whistle-blowers and "attempted unlawful conduct"

97. Competition law needs to be framed to provide a basis to deal with both actual and attempted anticompetitive conduct.

98. It is important that the attempt to contravene the law is dealt with as harshly as the actual conduct.

99. While discussing this topic it is worth considering the protections offered to potential witnesses be they whistle-blowers, leniency applicants or simply citizens who have somehow become witnesses of some relevant fact.

100. The foregoing concern may be addressed by the Witness Protection Programme under the DOJ, a mechanism that encourages witnesses to testify by protecting them against reprisals and economic dislocation

Recommendation: Any new regime must include a leniency regime, whistle-blower protection and an offence for attempted anticompetitive conduct to be truly effective. Consideration should be given to the concept of leniency, not just immunity.

The capacity of the Department of Justice prosecution regime

101. A number of agencies have a role in the pursuit of criminal offences as envisaged by the draft laws. To quickly recapitulate, the regime will have OFC staff investigating and collecting evidence, NBI staff assisting and also collecting evidence, NPS staff conducting the preliminary investigation and if a decision is taken to proceed to court, prosecuting the case before the Regional Trial Court.

102. The OFC is to be commended for already having NBI staff seconded to work within the ranks of the OFC. It is clear that the OFC leadership understands there is a capacity-building challenge ahead. Notwithstanding this awareness, there remains cause for concern that a failure to properly appreciate the resource demands from within the NBI will impact negatively on the implementation of any new competition law regime.

Recommendation: Any budget proposal to fund a Competition Agency must at the same time consider the funding implications for the National Bureau of Investigation and the National Prosecution Service.

The judiciary – capacity

103. The OFC has already engaged in some advocacy and capacity-building work, including some early work in the education of legal professionals with an information/education event held with a number of judges early in 2013. As with much of the early education/advocacy work that has been undertaken, the OFC is to be commended for recognizing the judiciary as a target audience.

Recommendation: The Office for Competition should maintain a relationship with the judiciary to ensure the court is well versed in any new law, and equally in the demands that will be placed on the court when cases are presented for adjudication. This relationship must respect the independence of the court officers, but can be managed in a manner that is beneficial to both the regulator and the judiciary.

The enforcement task

104. The challenge of managing the gathering of evidence and the prosecution tasks associated with enforcing competition law has already been touched on. It is equally important to consider the range of skills needed to deliver the full range of an enforcement regime.

105. The structure and staffing of the regulatory body need to reflect the complexity of the task – especially in the early days of a new law. There will be pressure to prosecute cases before the court as this is the only way to develop the law – jurisprudence helps interpret the law and only results from contests before the court. The reality for a competition regulator is that this will take time – many years. The range of enforcement tools cannot all be put on hold waiting for the courts to interpret and develop the law. The administration (whether within the DOJ or independent) will need to develop an enforcement policy to help the broader commercial sector understand what this regulator is about.

106. Linked to the enforcement task but not part of that task is the need to have capacity to undertake market analyses – clearly there is a need to understand various markets and the potential for anticompetitive conduct to be influencing the consumer experience in a negative way. The skills to perform this work are not necessarily based on the same skills needed for those officers at the sharp end of evidence gathering and prosecution activity.

107. After a series of trainings on sector studies and market analysis, the OFC is now preparing studies and inquiries in the transport, energy and telecommunications sectors.

Recommendation: The OFC should continue the work it has already commenced to ensure that capacity is built in all facets of the administration of an effective competition law. Consideration should be given to ongoing engagement within the ASEAN community and the wider international community to assist in the development of skills and policies in this critical area. Early consideration should be given to approaches that take advantage of social media and the latest technology.

Public awareness – a complaint-handling regime

108. The OFC has recognized in its Strategic Plan of Action the need for a complaints-handling process. This is far more important than just having a robust internal process so that matters are managed and not lost. This internal process needs to be a key pillar on which public confidence is built.

Recommendation: The OFC should proceed with the development of a complaint-handling regime and a reporting regime that will contribute towards the building of public confidence.

Summary of recommendations

109. The recommendations are best considered when grouped into those directed toward legislators, the Government and/or agency officials.

Directed to legislators

A comprehensive competition law applying to all parts of the economy should be drafted and passed into law through the parliamentary process at the earliest opportunity.

Any new law should be designed as an "economy wide" law with very limited scope for exemptions unless a public benefit test is written into the law.

Any new regulatory model should be established in a manner that has considered the call for independence from political interference within the UNCTAD Model Law on Competition, and is likely to be perceived by the wider community as effectively independent of the political system.

The effective use of the full range of enforcement options must be recognized by both the legislature and the officials of any future competition regime. The challenge of the criminal burden of proof for cases involving anticompetitive agreements, together with the lengthy time frame for such cases to be processed require that all options are considered to quickly drive compliance.

Any competition law should contain a provision to ensure that, where the offender is a corporation, partnership, association, firm or other entity, the financial liabilities are joint and several directed against directors, executive officers, general partners, and the like.

Any new regime must include a leniency regime, whistle-blower protection and an offence for attempted anticompetitive conduct to be truly effective. Consideration should be given to the concept of leniency and not just immunity.

Directed to Government

Any new regulatory model should be adequately funded to deliver traditional enforcement together with education, advocacy and business support. The concept of the agency being self-funded by retaining monies levied as penalties or fines should be avoided due to the perverse incentives this creates.

Any budget proposal to fund a Competition Agency must at the same time consider the funding implications for the NBI and NPS.

Directed to agency officials

The effective use of the full range of enforcement options must be recognized by both the legislature and the officials of any future competition regime. The challenge of the criminal burden of proof for cases involving anticompetitive agreements, together with the lengthy time frame for such cases to be processed require that all options are considered to quickly drive compliance. (Duplicated in legislator section.)

Clear guidelines need to be produced explaining decision-making, evidence-taking, hearings and appeal rights for the administration of any penalty regime included in any new competition laws.

The OFC should maintain a relationship with the judiciary to ensure the court is well versed in any new law, and equally in the demands that will be placed on the court when cases are presented for adjudication. This relationship must, of course, respect the independence of the court officers, but can be managed in a manner that is beneficial to both the regulator and the judiciary.

The OFC should continue the work it has already commenced to ensure capacity is built in all facets of the administration of an effective competition law. Consideration should be given to ongoing engagement within the ASEAN community and the wider international community to assist in the development of skills and policies in this critical area. Early consideration should be given to approaches that take advantage of social media and the latest technology.

The OFC should proceed with the development of a complaint-handling regime and a reporting regime that will contribute towards the building of public confidence.